



**U.S. Fish and Wildlife Service
California/Nevada Operations Office
2800 Cottage Way, Room 2606
Sacramento, California 95825**



**U.S. Bureau of Reclamation
Mid-Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825**

January 27, 2000

Mr. Thomas M. Hannigan
Director
Department of Water Resources
1416 Ninth Street
Sacramento, California 95814

Dear Mr. Hannigan:

Thank you for your January 7, 2000, letter again asserting the State Water Project's claims for repayment of "foregone water supplies." In response to your July 28, 1999, letter, we met with your staff, and had several productive discussions. This letter now provides the opportunity to clarify the Department of the Interior's perspective on when the Accord or other policies require repayment to the SWP.

As you know, the 1994 Accord provides for federal acquisition of water for repayment in one situation: actions required to comply with biological opinions for species listed after the Accord was executed. Separately, for then-listed species, it provides: "Compliance with the take provisions of the biological opinions under the Federal Endangered Species Act (ESA) is intended to result in no additional loss of water supply annually within the limits of the water quality and operational requirements of these Principles. To implement this principle, the Ops Group will develop operational flexibility through adjustment of export limits." In addition, Interior's Decision implementing Section 3406(b)(2) of the Central Valley Project Improvement Act commits Interior to repaying the SWP for any adverse impacts to SWP supplies arising from its participation in any "(b)(2)" action.

Applying these commitments to the events identified in your letter and your subsequent explanatory chart, we conclude that Interior owes the SWP approximately 13,000 acre-feet of water for its participation in last spring's (b)(2) actions during and just after the "pulse flow

period." We should discuss soon how best to settle our debt. We have several ways of repaying this water, including making federal water available in the Delta for your pumping or determining whether the SWP already received some repayment from our (b)(2) releases. We have calculated this debt based on the following facts as to the export reductions that you have identified, which we have organized by date.

April 17-May 13. As you may recall, the Federal District Court issued an injunction prohibiting Interior from implementing any (b)(2) actions during this period. As a result, the CVP and the SWP were complying with the requirements of the delta smelt biological opinion issued pursuant to the Endangered Species Act on March 6, 1995. We disagree with your assertion that CVP/SWP compliance with that biological opinion is voluntary. We consistently have informed your staff that these actions are mandatory because the SWP applied for Section 7 protection and therefore has co-equal responsibility with the CVP. The SWP must conform to the requirements of the project description and the biological opinion's terms and conditions. While the biological opinion's pulse flow period export reductions are labeled an "objective," those reductions remain a CVP/SWP obligation for a species that was listed at the time of the Accord. As you are aware, the Fish and Wildlife Service has offered to issue a written clarification on this point.

May 14-31. When the Court lifted the injunction on (b)(2) actions, you joined us in implementing the final four days of the (b)(2) export reductions and the following two weeks of gradual ramping of export increases. As your July 28, 1999, letter indicated, your staff estimated the loss to SWP from cooperating in the reductions and ramping at 63,000 acre-feet, which we acknowledged and committed to repay. (We did not agree that the federal government is required to repay the SWP for its compliance with the delta smelt biological opinion during this period.) As you may recall, we purchased 50,000 acre-feet of water on the Stanislaus, which we released, allowing you to reduce your releases from Oroville Reservoir. The Delta accounting indicates that you gained approximately 50,000 acre-feet from the Stanislaus releases and other CVP actions. As a result, Interior still owes the SWP 13,000 acre-feet of water for its participation in the spring (b)(2) actions.

June 1 - July 1. On May 31, the (b)(2) action was completed. During June, when the two projects continued to exceed the monthly take limits contained in the delta smelt biological opinion, pumping remained at low levels pursuant to the requirements of the Endangered Species Act. Again, we disagree with your contention that these reductions were voluntary. The reductions were reasonable and prudent measures. Interior nevertheless has worked closely with SWP staff to make up - to the extent possible within the limits of operational flexibility - any supplies lost due to compliance with the delta smelt biological opinion, as we

Mr. Thomas M. Hannigan

January 27, 2000

Page 3

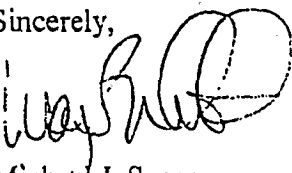
have in past years when supplies were more plentiful. Because the delta smelt was listed at the time of the Accord, however, there is no requirement that the federal government repay the SWP for its actions complying with the ESA.

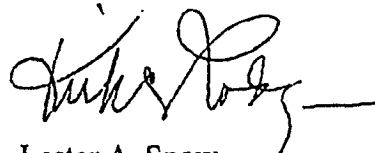
December 9 - 31. The SWP reduced its pumping during this period in order to improve Delta water quality in compliance with the State Water Resource Control Board's Water Quality Control Plan for the Delta (WQCP). The CVP reduced its pumping pursuant to (b)(2), which also helped improve Delta water quality. The increased salinity arose out of a number of conditions - including dry weather, record high/low tides, delay in (b)(2) implementation and closing the cross channel gate.

Various parties have alleged that the only reason for December's water quality problem was the closure of the Delta Cross-Channel gates, and the Cross-Channel gates were closed only because the spring-run salmon was a listed species. It should be noted that the November 26 gate closure was carried out in compliance with the WQCP and the Accord, which were in place before the listing of the spring-run salmon and provided for up to 45 days of gate closure "as needed for the protection of fish" during the November-January period. The gate closure also carried out the State's Spring-run Protection Plan, adopted by the State Fish and Game Commission. Considering the key role of the State's own Endangered Species Act and its fishery management responsibilities, the State should contribute, in some way, to protecting this State-listed species. These facts suggest that the federal government's repayment commitment for new federal listings would not come into play, even if the entire water quality problem could be attributed solely to the gate closure.

We appreciate your explanation of the purpose and value of the SWP's "interruptible supplies." We look forward to further discussion of these issues, as well as the many other long-term operational issues that demand our participation in resolving.

Sincerely,


for Michael J. Spear
Manager


Lester A. Snow
Regional Director